No. 13[illegible]

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] Anderson,

Appellant,

vs.

George [illegible], The [illegible] Press, Inc., Hallmark Productions, Inc., Kroger Babb, Fox West Coast Theatres Corporation, National Broadcasting Company, Inc. and Does One through Twenty,

Appellees.

Appeal From Judgment in Favor of Appellees, of the United States District Court, Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT.

Alexander H. Schullman,
Suite 511,
[illegible] Wilshire Boulevard,
Los Angeles 48, California,
Attorney for Plaintiff, Appellant.

[illegible] Press, Los Angeles. [illegible]

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN AXELBANK,

Appellant,

vs.

GEORGE RONY, THE COPLEY PRESS, INC., HALLMARK PRODUCTIONS, INC., KROGER BABB, FOX WEST COAST THEATRES CORPORATION, NATIONAL BROADCASTING COMPANY, INC, and DOES ONE through TWENTY,

Appellees.

Appeal From Judgment in Favor of Appellees, of the United States District Court, Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT.

I.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Appellant, HERMAN AXELBANK, filed a Complaint [C.T. p. 2*], thereafter an Amended Complaint [C.T. p. 16*], for copyright infringement and unfair competition against the Appellees. Appellees, respectively, filed their answers [C.T. pp. 35, 41] denying the allegations

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*C.T.—Clerk's Transcript.

of the Complaint and denying that the particular copyright with respect to the motion picture "TSAR TO LENIN," was owned by plaintiff but that the material involved was in public domain, and in their Answer, Appellee, GEORGE RONY, counterclaimed for libel.

Appellant sought damages against Appellees in the sum of One Million Dollars and additional damages for the alleged Appellees' (defendants') infringement of said copyright and unfair trade practices and unfair competition and also sought for an accounting of all gains, profits and advantages allegedly derived by Appellees by reason of such infringement and said unfair trade practices and said unfair competition.

A motion was made by Appellees to dismiss the Amended Complaint [C.T. p. 27] which was denied [C.T. p. 34].

At the close of the case of Appellant (plaintiff) motions were made by all of the Appellees to dismiss plaintiff's case, which was denied [R.T. p. 103].

The entire case was tried before His Honor Judge HARRY C. WESTOVER, without a jury, and periodically continued until concluded, and the Court entered a Minute Order on June 14, 1957, after submission of the case after trial. [R.T. p. 212].

The Trial Court, after Appellees had filed proposed Findings of Fact, Conclusions of Law and Judgment, to which trial counsel for Appellant filed written objections, filed the Findings of Fact and Conclusions of Law and entered judgment against Appellant, under date of July 12, 1957, [R.T. p. 226]; in which, judgment was given in favor of Appellees against Appellant, and which judgment also was entered in favor of Appellee, GEORGE RONY, on his counterclaim for libel in the sum of $500.

Appellant filed his Notice of Appeal [R.T. p. 243], his Designation of Record on Appeal [R.T. p. 251] and his Statement of Points on Appeal.

Jurisdiction in this case, both in the United States District Court for the Southern District of California and in this Court, is patent under Title 28, U. S. Code, Section 1338, and Title 17 U. S. Code, Section 1 *et seq.*, as set forth in Complaint and Amended Complaint [R.T. pp. 2, 16].

This appeal was taken pursuant to Rule 73 Federal Rules of Civil Procedure, and as provided for in 28 U. S. C. A. Section 1291.

II.

Statement of Case.

Appellant (Plaintiff), HERMAN AXELBANK, manifested an interest in the historical and political significance eventuating in the Russian Revolution. [R.T. pp. 210-215].*

As a result, Appellant espoused the idea of a production of a historical and documentary film depicting the Russian Revolution and the events both before and afterward. From the testimony, it is clear that he devoted himself completely to this project. [R.T. pp. 214-215]. For this purpose, he acquired vast quantities or original negatives, of exposed but undeveloped film and usually from cameramen who had photographed the event, or through the agents of such cameramen.

In the trial, Appellant introduced testimony authenticating his expenditures with respect to the nature and quantity of the film which he purchases, setting forth

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*R.T.—Reporter's Transcript.

the source, the amount of film purchased, and whether such film was original or not. [R.T. pp. 216-248; 270, 274; Pl. Exs. 27, 28, 29, 30, 31, 32, 33, 37 and 38].

At the trial, the Plaintiff produced the negatives of his film, which subsequently was entitled FROM TSAR TO LENIN, and proffered expert testimony that the great majority of the film were original negatives. [R.T. pp. 228; 240-241; Pl. Ex. 29]. The trial court also inspected the negatives [Pl. Ex. 34; p. 260].

With respect to duplicate negatives in his footage, Appellant testified that because the film was nitrate and subject to deterioration, duplicate negatives were made. [R.T. pp. 250-257; 258, lines 18-24].

Appellant further testified that on or about 1928, there had been accumulated approximately 360,000 feet, or approximately 370 reels of negative film, the majority of which was original, which he edited until it was reduced to approximately 25 reels, with chronological sequence. [R.T. pp. 248, 249].

Mr. Eastman, witness for Appellant, testified that during that period, to-wit, 1927-1928, Appellant entered into a written agreement under date of February 15, 1929, [Pl. Ex. 10] with Max Eastman, a distinguished teacher, lecturer and writer, and an authority on the history of the Russian Revolution, whereby Appellant and Eastman together would edit the voluminous film. [R.T. p. 50].

Accordingly, the film was turned over to Eastman and was edited by Eastman down to fourteen reels, with explanatory sub-titles. [R.T. pp. 53, 54; Pl. Ex. 11].

Both the Appellant and Eastman testified that for visual purposes in the editing of the films, the plan of animated maps was conceived to exemplify the movement

of troops during stages of the conflict. Eastman furnished Plaintiff with details of what he required, and an artist was engaged for such preparation. The original instructions were introduced in evidence. [Pl. Ex. 12, p. 59]. The receipt of the artist for his preparation of the maps was also introduced in evidence. [Pl. Ex. 41; pp. 278-280].

Plaintiff expended $1600.00 or more in the reproduction and integration in the final fourteen reel version of the film. [R.T. p. 56; Transcript, p. 56, line 13, in error, states $16.00].

Also, Appellant (Plaintiff), had the artist prepare black pen and ink drawings in miniature of the hammer and sickle of the Russian double eagle, and of names of various cities, which were super-imposed on the maps, which were photographed and integrated into the 14-reel version of the film. All these were introduced in evidence. [Pl. Exs. 13, 14, 15 and 25; R.T. pp. 59-61].

In 1929, Eastman made a trip to Europe, [R.T. pp. 69, 70], searching for film to fill in the gaps for continuity. [R.T. pp. 69-73]. Eastman also retained a photographer to film Kerenski in Paris and Trotsky in the Island of Princapo. [R.T. p. 67].

Eastman testified that while he purchased some footage abroad, strangely, there were few shots in the libraries he visited which compared with or were similar to the material furnished to him by Plaintiff. [R.T. pp. 49-50]. Eastman testified he returned to the United States on or about December, 1929 and proceeded to edit the film, and instructed Plaintiff to have "blow-ups" made of specific scenes. This was utilized so as to have the effect of a close-up. [R.T. pp. 73-86]. Approximately,

twenty scenes were "blown up," amongst which were those of the former Czar marching with his troops; the address of Lenin to a large crowd in Uritski Square; the oration of Trotsky from the platform of a train; the address of Lenin to a crowd at the Kremlin wall; Trotsky smiling; the former Czar speaking to his bodyguard; a Kerenski scene; all of which were cited in the Record. [R.T. pp. 73-86].

Some time thereafter, as Eastman testified, there were disagreements between Appellant and Eastman, which resulted in litigation wherein Eastman sought to be termed a "joint venturer." For the purpose of maintaining status quo, the New York court appointed Receivers of all of the negative and positive prints of TSAR TO LENIN, which was the 14-reel version. [R.T. p. 87].

While the matter was in receivership, on or about May 13, 1936, the then Receivers contracted with Lenauer International Films, providing for cancellation under certain conditions for distribution of the film TSAR TO LENIN. [Pl. Ex. 16; R.T. pp. 86-88]. It is apparent from this agreement and the testimony of Appellant and Eastman that this film had no sound track, musical score or narration, and was reduced to a 7-reel version. The 7-reel version had added to it a sound track consisting of a commentary and a musical score. There is no testimony by either of the parties to this lawsuit that the 14-reel version of the film was ever publicly exhibited.

While the distribution contract provided that the film "in the form in which it shall be distributed" was to be copyrighted in the names of the Receivers, this was not done. Instead, on March 10, 1937, Lenauer International Films, Inc. registered its claim to copyright to the 7-reel version, [Pl. Ex. 21; R.T. pp. 101, 102].

This film was exhibited publicly for the first time on March 6, 1937, being the date of the publication in the United States [R.T. p. 287].

Appellant testified there were further public exhibitions in 1938 and 1939, all presumably by Lenauer International Films. [R.T. p. 287].

On April 16, 1937, Lenauer International Films granted a certain Maurice Lehmann of Paris a 7-year exclusive license to distribute the French version of the film in France and other areas. [R.T. p. 288]. Pursuant to this agreement, Lehmann was obligated to return all prints or to furnish proof that the prints in his possession had been destroyed.

On March 6, 1941, in the case of *Eastman v. Axelbank,* the New York court discharged the Receivers, and appointed Plaintiff in this action as Receiver, and ordered the former Receivers to deliver to Axelbank, as Receiver, all the motion picture films, negative and positive, of TSAR TO LENIN. [R.T. pp. 89-92; Pl. Exs. 17, 18, 19, 20].

On November 9, 1952, Eastman and Axelbank settled their differences, and on November 10, 1952, Lenauer International Films, Inc. assigned the copyright to TSAR TO LENIN, including hte assignment of all rights and causes of action for infringement of copyright, unfair competition, or other wrongful contracts or torts, with respect to the film, to the Receiver. [Pl. Ex. 22; R.T. p. 104], and the Receiver in turn, assigned the copyright to himself, Axelbank, as an individual. [Pl. Ex. 23; R.T. p 120].

On February 21, 1956, the action of *Eastman v. Axelbank* was formally disposed of by the Supreme Court of the State of New York recognizing the assignment

of the copyright to Axelbank *nunc pro tunc* as of November 17, 1956, and the action was dismissed, [Pl. Ex. 59; R.T. p. 700; Pl. Ex. 20; R.T. p. 92], on February 21, 1956, which gave Appellant Axelbank the copyright and also disposed of an action which Axelbank had previously filed in 1957 in the United States District Court for the Southern District of New York, against the former Receivers and against other defendants, for the return of all negatives, sound prints, sound tracks, discs or sound records [Defendants' Ex. F; R.T. p. 578; Pl. Ex. 20; R.T. p. 92]. This litigation was terminated in 1952, at the same time that the litigation between Eastman and Axelbank had been terminated. [R.T. p. 92; Pl. Ex. 20].

In the settlement, Hays and Blackman, former Receivers, returned to Axelbank the films in their possession. Eastman surrendered all claim to any interest in the films; March of Time paid Axelbank $3,000.00; another defendant paid $500.00, and the remaining defendants agreed to return to Axelbank the various prints in their possession. [R.T. Pl. Exs. 20, 59; R.T. pp. 92, 700, 366; Pl. Exs. 54A, B, C and D].

On March 6, 1953, Appellant licensed the Columbia Broadcasting System to use in a nation-wide television broadcast certain footage. [R.T. pp. 337-345; Pl. Exs. 49, 50, 51, 52]. On March 8, 1953, while Appellant was waiting for the telecast of the CBS program, there was a telecast on the NBC network containing a substantial portion of Appellant's film, identical as to scenes and content with the material he had licensed to CBS. [R.T. pp. 337-345]. At the trial, it was stipulated that the NBC telecast occurred on Sunday, March 8, 1953 between 2:00 and 2:30 P. M. [R.T. pp. 207-209; Pl. Ex. 26]. It is

also admitted that approximately 15 minutes and 10 seconds of the remaining time of the film for the NBC program was furnished by Appellee Rony. It is unquestionable that the script for this telecast established that this portion of the footage supplied to Appellee NBC by Appellee Rony corresponded exactly with the footage of Appellant's film. [Pl. Ex. 26; R.T. pp. 207-209]. Appellee Rony, as president of Educational Film Enterprises, Inc., in March of 1955, entered into an agreement with Appellee KCOP for telecasting of a series under the title Background to Battle. [R.T. pp. 30-37; Pl. Exs. 3, 4, 5, 6, 7].

The Last Czar, the first of these broadcasts, was telecast on May 23, 1955. [R.T. pp. 30-37]. An episode called The Big Fraud was telecast on June 10, 1955, and re-run September 2, 1955 [Pl. Exs. 3, 4, 5 and 6; R.T. pp. 30-37].

It is clear that Appellee Rony's films had misappropriated Appellant's film Tsar to Lenin. Similarly, Appellant learned that Rony's film Half Way to Hell, produced by Appellee Hallmark, also infringed on Appellant's film. Half Way to Hell clearly derived its footage from a film produced by Appellee Rony formerly known as Blood Brothers and before that, Tower of Babel [R.T. pp. 30-37].

It must therefore be clear and unequivocal that all of the film allegedly produced by Rony, Fifty Years of History, Russia 1900-1955, Blood Brothers, the episodes in Background to Battle, The Last Czar and The Big Fraud, all contain identical sequences with those in Appellant's film Tsar to Lenin.

It seems to be incredible and physically impossible that defendant Rony as he testified, amassed a vast library

of documentary film in fantastic escapes from Russia and smuggled films from Russia in a coffin. [R.T. pp. 635-663]. Most importantly, it is crystal clear the blown-up picture of one of the maps used by Appellee Rony where the emblem of the hammer and sickel were superimposed, was the identical blow-up of various persons and scenes appearing in Appellant's film. The films showing Kerensky in Paris, which were specially produced for Appellant, the critical sequences of scenes, cannot be coincidental, but must be attributed to the simple and sole explanation of misappropriation. The behavior of Rony in the encounter with Appellant and Rony's insistence that Appellant merely wanted the return of his films and not money [R.T. pp. 635-663] accentuated the obligation of Appellees in this matter.

From the facts and the record, it seems clear that the Appellees misappropriated and infringed on the ownership and films of the Appellant and that the Trial Court should so have found and entered judgment for the Appellant.

The facts set forth in the Statement of the Case raise four essential questions, in which we contend that the Trial Court erred and in which we contend require that a reversal should be granted in this case.

While there are more questions involved, fundamentally this entire matter pivots on these four:—

1. Is the material contained in the films of the Appellant copyrightable and compensable for infringement?

2. Is failure to record a copyright assignment a defense to an infringer?

3. Are damages recoverable for unfair competition, even if it is conceded, for the purposes of discussion,

that the subject matter of the work may be in the Public Domain, and even though the work has been published?

4. Is the New York order recognizing Appellant's copyright, *nunc pro tunc,* valid in this case?

We should also add, of course, the issue with respect to the counterclaim, in which judgment was given for Appellee Rony:—does the testimony, and the applicable law, fail to establish libel in favor of Appellee Rony, in this case.

We submit that the answer to all these should be in the affirmative; all of these issues have been raised during the trial by objections and argument made by trial counsel for appellee, and, by objections to the proposed Findings of Fact and Conclusions of Law and Judgment, and of course, by this Appeal.

III.

Specification of Errors.

1. The Court erred in finding and ruling that the copyright on the films in question in this case did not belong to the Receivers. [F. of F., C. of L. and Judgment; C.T. p. 226].*

2. The Court erred in finding and ruling that, at the expiration of the Receivership, the return of the films in question did not carry with it the legal obligation to transfer the copyright back to the rightful owners thereof. [F. of F., C. of L. and Judgment; C.T. p. 226].

3. The Court erred in finding and ruling that the films were sold, when as a matter of fact, there was only a rental lease, or franchise arrangement; and the

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*Findings of Fact—F. of F. Conclusions of Law—C. of L.

Court further erred in finding and ruling that the purchasers could do anything with said films, without regard to copyright, and without regard to plaintiff's rights and ownership. [F. of F., C. of L. and Judgment; C.T. p. 226].

4. The Court erred in failing to find and rule that Appellant, HERMAN AXELBANK, was the successor-receiver, and also was and became the owner of said film, and entitled to said copyright. [F. of F., C. of L., and Judgment; C.T. p. 226].

5. The Court erred in failing to find that in the case of *Eastman v. Axelbank,* in the United States District Court for the Southern District of New York, on or about March 6, 1941, said United States District Court for the Southern District of New York appointed in place of all Receivers involved with said film, Plaintiff and Appellant, HERMAN AXELBANK, and ordered the former Receivers, among other things, to deliver to said HERMAN AXELBANK, as Receiver, all the motion picture films, negative and positive, of TSAR TO LENIN.

6. The Court erred in failing to find that, in another action of *Eastman v. Axelbank,* on February 21, 1956, the Supreme Court of the State of New York entered a *nunc pro tunc* Order dismissing said action, and thereby recognizing Plaintiff-Appellant herein as the owner of the copyright of, and the owner of, the film TSAR TO LENIN.

7. The Court erred in failing to find that all rights to said copyright, and to said film, had, prior to this instant trial, been merged in the Plaintiff and Appellant, HERMAN AXELBANK.

8. The Court erred in failing to find and rule that the Defendant and Appellee, RONY, actually infringed on

Plaintiff-Appellant's copyright, and that as a result thereof, the use by the remaining Defendants and Appellees, constitute an infrongement on Plaintiff-Appellant's copyright and ownership rights of said film; that said Court further erred in failing to find as a result thereof, that Plaintiff-Appellant suffered considerable damages.

9. The Court erred in failing to find and rule that said Defendant-Appellee, RONY, wrongfully appropriated Plaintiff-Appellant's property.

10. The Court erred in failing to find that the copyright of said film covered the entire work; and failed to find further that if any portion of said film represented non-protectible matter, Defendant and Appellee, RONY, had no legal right to utilize the same, and that the remaining defendants and appellees similarly had no legal right to use the same without the consent of Plaintiff-Appellant, and without compensating Plaintiff-Appellant for such improper use.

11. The Court erred in failing to find that, while historical facts and events in themselves are in the public domain, and may not be entitled to copyright protection, the addition of new and original material to such matters in public domain, or the application of ingenuity and originality to the compilation and presentation of material which is in the public domain, such an individual is entitled to have the entire work covered by the copyright which he may receive. The Court therefore erred in failing to find and rule that Plaintiff-Appellant, HERMAN AXELBANK, was a copyright owner and the owner of said film TSAR TO LENIN.

12. The Court erred in failing to find and rule in the first instance, that said HERMAN AXELBANK, Plaintiff-

Appellant, was an equitable owner of said film, and could sue in his own right; and further failed to find and rule that the *nunc pro tunc* Order of the New York Supreme Court cured any alleged capacity on the part of Plaintiff-Appellant to sue in his own name.

13. The Court erred in finding and ruling in favor of Defendant-Appellee, ROXY, and in favor of the remaining defendants and appellees, in that such findings and rulings were not supported by evidence in the case.

14. The Court erred in granting judgment for Defendants and Appellees; and the said Court further erred in granting judgment for Defendant-Appellee, ROXY, on his counter-claim for libel, since all such judgments were not supported by the evidence.

15. The Court erred in finding and ruling that Defendant-Appellee, ROXY, could recover on his counter-claim for libel for the reason that the said letter involved was privileged; said letter was not libelous *per se;* and the Court further erred in failing to dismiss the counter-claim filed by Defendant-Appellee, ROXY, for damages for libel.

16. The Court erred in failing to find and rule that the burden of proof on the source of defendant's film, and on the proof of Defendants right to use the same, is on said Defendants and Appellees, after Plaintiff-Appellant has established the identity of the subject, the exactness of the pictures used in all the films, and has established a *prima facie* case of appropriation.

17. The Court erred in failing to find and rule that Plaintiff-Appellant is entitled to recover damages suffered from the infringement, and that such damages include all the profits which the Defendants-Appellees have made

from such infringement, or, that said Plaintiff-Appellant was entitled, in lieu of damages and/or profits, to recover the arbitrary damages spelled out in the Copyright Code.

18. The Court erred in failing to find, and grant judgment for Plaintiff-Appellant and against Defendant-Appellees.

IV.
Argument.

In this matter, the argument may be summarized as follows:

1. The Trial Court erred by its entry of judgment, contrary to the evidence and the law, in failing to find that the Appellant was the copyright owner of "TSAR TO LENIN," and that Appellees have infringed thereon.

2. The Trial Court erred in its judgment in favor of Appellees, and during the trial, in not finding that, failure to record an assignment of a copyright is not a defense to an action for infringement against an infringer.

3. The Trial Court erred in its judgment in failing to award damages to Appellant upon his complaint of unfair competition, even if the Trial Court assumed or found that some of the material was in the public domain and had been published.

4. The Trial Court erred in failing to give credence and validity to the order of the New York Supreme Court, *nunc pro tunc,* recognizing Appellant as the copyright owner of the film, "TSAR TO LENIN."

5. The Trial Court erred in finding for the Appellee, Rony, that libel had been committed awarding damages to Rony when the evidence established, that the letter

written by Appellant was privileged, and based upon the belief of the Appellant, that the facts set forth in said letter were true.

A. The Facts and the Law Establish That Appellant, Axelbank, Was and Is the Copyright Owner of the Film, "TSAR TO LENIN," and that the Appellees (Defendants) Infringed Thereon.

The Copyright Act (17 U. S. C. 5) designates motion picture photoplays as subject to being copyrighted.

The testimony establishes that Appellant is the owner of copyright film, "Tsar to Lenin." (See statement of case above).

There is no question that the evidence also establishes that Appellee, Rony, and, of course, the other Appellees, have infringed on this film by the telecasting and showing of various film productions, including episodes of a television series entitled "The Last Czar of Russia," "The Big Fraud," the film, "Russia: 1900-1959," and various footage incorporated, and furnished by Appellee, Rony, into the motion picture, "Half Way to Hell."

The Appellees, Hallmark Productions, Inc. and Fox West Coast Theatres Corporation, produced and exhibited "Half Way to Hell." This is undenied. The Court, nonetheless, found in favor of these Appellees.

Also, Appellee, Rony, sold film material, which constituted an infringement, to NBC, who telecast the same.

Intention to infringe is not necessary to an actionable infringement.

Douglas v. Cunningham, 294 U. S. 207;

Witmark and Sons v. Calloway, 22 F. 2d 412 (D. C. Tenn. 1927).

The Trial Court substantially erred in failing to recognize the ownership and copyright of the Appellant, in pronouncing judgment against Appellant.

In *Warner's* Work, "Radio and Television Rights," at page 271, it is stated:

> "The exclusive right to vend includes the right to lend, lease, or give away copyrighted works. If the copyright proprietor has disposed of his work unrestrictedly, *i.e.*, parted with the title, he is precluded from restricting its resale price or territorial use. Thus, in *Bobbs-Merrill v. Strauss*, a notice on the title page of a book purporting to limit the price at which the book would be sold at retail by future purchasers with whom there was no privity of contract was declared invalid. In other words, whenever the copyright proprietor parts with his title and ownership in a particular copy, he exhausts his statutory right to vend. The purchaser of the copy acquires 'the free mental use' of the same with the right to resell it; but the purchaser cannot multiply copies of the copy or exploit its contents for the purpose of deriving a pecuniary profit from the intellectual labor of the author."
>
> *Bobbs-Merrill Co. v. Strauss*, 210 U. S. 339, 350.

See also the leading case of

> *International News Service v. Associated Press*, 248 U. S. 215, 236 to 242.

It is clear, therefore, that Appellee, Rony, made a print, without authority, of Appellant's film and he, therefore, was liable for damages. This is indisputable, in view of the incontrovertible evidence with respect to the blow-ups and the maps [R.T. pp. 73-86] which require a finding

that Appellee Rony, copied the material owned by Appellant. The Trial Court should have definitely found as a fact, and as a matter of law, and in this respect the Trial Court seriously erred, that there was only one source for these portions of film which were identical with the material owned by Appellant. There was not an iota of documentary evidence offered by Appellee, Rony, as to the source of these particular sequences in his film. The Trial Court erred in failing to give full credit and validity to the testimony of the witness, Eastman, who stated, in effect, that proof of taking of these sequences (*i.e.* those made by Appellee, Rony) coupled with the identity of the arrangement of the critical sequences, the Peace and Bread banners and the War Victory banners showed that the source of Appellees' Russian footage could only have been from the film of Appellant.

It is respectfully urged that these errors are sufficient in themselves, as a matter of law, to require reversal of the judgment of the District Court of the United States.

B. The Trial Court Erred in Its Findings of Fact, Conclusions of Law and Judgment in Favor of Appellees; the Trial Court Seriously Erred in Failing to Find That Appellees Infringed on the Copyright of Appellant, Even Though Appellant Had Failed to Record His Assignment of the Copyright.

Appellees cannot escape their liability of infringement by the defense that Appellant failed to record his assignment of copyright.

Appellees were not bona fide purchasers from a prior registrant, but actually were tort-feasors. Failure to record an assignment by Appellant does not exculpate Appellees from liability if there has been an infringement.

This is particularly true since the Copyright Act in Section 30 (17 U. S. C. A. 30), while requiring recordation of an assignment, clearly limits the effect of failure to record as follows:

> "In default of which it shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."

Of course, Appellees were not subsequent purchasers. This has been upheld in

New Fiction Pub. Co. v. Star Pub. Co., 220 Fed. 994;

Amdur, *Copyright Law and Practise* (1936, p. 799);

Howell, *The Copyright Law* (1948, p. 159);

Warner, *Radio and Television Rights* (1953, p. 117).

C. The Trial Court Seriously Erred in Failing to Render Judgment for the Appellant; This Is True Even if the Copyrighted Work Contained Some Material Which Is in the Public Domain; This Is Also True With Respect to the Unfair Competition Committed by the Appellees. The Contract of the Receivers in This Matter, and the Lenauer International Was for 10 Years. It Provided That the Receivers Would Cause the Film to Be Copyrighted. [Pl. Ex. 16.] This Was Done in the Name of Lenauer International [Pl. Ex. 21].

At the end of 10 years Lenauer was obligated to execute an assignment to the Receivers and the copyright would revert to the true owner at the expiration of the license period.

Sunset Securities Co. v. Howard McCann, Inc., 47 Cal. 2d 907 (1957).

In the instant case, however, Lenauer International did in fact execute an assignment to the receiver on November 10, 1952. [Pl. Ex. 22].

A copyright covers the entire material which is the subject thereto. It is true that non-protectible matter may be used by others if such others go to the commons source or are not guilty of unfair competition; but the copyrighted work may not be copied. In this case it is clear that while some facets of Appellant's films were in the public domain, the entire subject matter was eligible for, and was copyrighted.

The use by the Appellees in violation of the rights of Appellant require judgment for Appellant.

American Code Co., Inc. v. Bensinger, 282 Fed. 829, 834;

R. C. A. Mfg. Co., v. Whiteman, 114 F. 2d 86 (2d Cir., 1940);

Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 249.

See also:

International News Service v. Associated Press, 248 U. S. 215.

D. The Trial Court Erred in Failing to Give Effect to the Nunc Pro Tunc Order of the New York Supreme Court Vesting Copyright and Ownership in the Appellant.

As we have set forth in the Statement of Facts, litigation between Appellant and all individuals was settled in 1952. While the Federal case was dismissed, inadvertently the State Court action remained.

For practicality, the Receiver was not required and Appellant thereafter acted as a Receiver since all contro-

versies had been disposed of, and the film had been returned to the Appellant.

In 1956, after due motion and hearings in the New York State Court, the order was entered *nunc pro tunc* approving all the acts of the Receivers, confirming the discharge of the Receiver as of 1952 and confirming, as between all parties to that litigation, the ownership of the films by Appellant as of 1952.

There is no question that the New York Court had jurisdiction to enter such an order. There was jurisdiction over both the subject matter and the parties. All litigation thereon had ceased and all of the parties had been mutually released.

A *nunc pro tunc* order authorizing various acts, past and future, by a receiver was entered by a New York Court in *Kliger v. Rosenfeld,* 114 N. Y. Supp. 1006, 1008 (N. Y. Sup. Ct. App. Div. 1909).

It is clear, therefore, that the New York order must be deemed valid, particularly since Appellees are not parties in the New York action and cannot attack the New York order. In this, the Trial Court, in this case, has seriously erred, since the execution of the New York order vests Appellant with the ownership and copyright and should have resulted in a judgment in favor of Appellant.

E. The Trial Court Erred in Rendering Judgment in Favor of Appellee, Rony, on His Counter-claim for Libel.

This argument arises by reason of Appellees' counter-claim and as a matter of law, involves separate issues than the law of copyright.

Since there is no Federal law of libel, this phase of the argument is governed by California law.

The letter was privileged. The letter sent by Appellant was provoked by reason of the telecast of the film "THE BIG FRAUD." [Pl. Ex. 4]. The film "THE BIG FRAUD" dealt exclusively with the periods in Russia and covered footage which were identical with that contained in Appellant's "TSAR TO LENIN." Mr. Axelbank wrote to Mr. Rony and accused him of appropriating his film. This is well within the privileged area of communication Moreover, there was no malice involved since Mr. Axelbank had never, prior to writing the letter, met Mr. Rony, and, of course, lack of malice is a complete defense.

Freeman v. Mills, 97 Cal. App. 2d 161, 167 (1950).

The letter was not libelous per se. The words "hot print" and "pirated" do not make the publication defamatory *per se.*

Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528.

The counter-claim for damages for libel should have been dismissed, at the conclusion of the case, and the judgment of the Trial Court should now be reversed.

V.
Conclusion.

In view of the foregoing, Appellant respectfully requests that the judgment of the Trial Court, rendered in favor of Appellees, and in favor of Appellee, Rony, on his counter-claim, for libel, should be reversed.

Respectfully submitted,

ALEXANDER H. SCHULLMAN,

Attorney for Appellant.